

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR,

Complainant,

v.

EVELYN D. KOMES d/b/a ECONOMY  
ROOFING AND SHEET METAL, and its  
successors,

Respondent.

OSHRC DOCKET NO. 01-2117

**APPEARANCES:**

For the Complainant:

Kevin Koplín, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

Before: Administrative Law Judge: James H. Barkley

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Evelyn D. Komes d/b/a Economy Roofing and Sheet Metal, and its successors (Economy), at all times relevant to this action maintained a place of business at Higgins and Landmeier Streets, Elk Grove Village, Illinois, where it was engaged in construction. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Because Respondent is an employer engaged in a business affecting commerce, it is subject to the requirements of the Act.

On May 25, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Economy's Elk Grove Village work site. As a result of that inspection, Economy was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Economy brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 5, 2002, a hearing was held in Milwaukee, Wisconsin. Prior to the hearing, Complainant withdrew items 1, 3a and 3b of citation No. 1; item 2 remains at issue. Only Complainant appeared at the hearing. This judge's decision was rendered at the close of Complainant's presentation of a prima facie case, as set forth below.

### Alleged Violations

Citation 1, item 2 alleges:

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-sloped roofs, with unprotected sides and edges 6 feet or more above lower levels were not protected from falling by the use of guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line systems and safety monitoring system:

(a) Higgins & Landmeier Rd., Elk Grove Village, Il.: Employees were working on a flat roof that was 160 feet x 130 feet. The employees were working without any fall protection and were exposed to a fall hazard of 30 feet.

### Facts

Anthony Smith, the OSHA Compliance Officer (CO) who conducted the May 25, 2001 inspection, testified that upon his arrival on the Elk Grove work site he noted Economy employees Charles Sullivan, Howard Ferguson, Chad Naranjo and Dan Pascally moving about the 130' x 160' roof (Tr. 6, 9-11). Smith observed one man working very near the edge of the 30' high building without the benefit of fall protection (Tr. 6-7, 9). Smith called up and identified himself to Economy's foreman, Charles Sullivan; Sullivan accompanied Smith as he inspected the roof (Tr. 8). According to Smith, Economy's employees were laying a tarp on top of the roof and covering it with gravel to prevent it from blowing away (Tr. 10). Smith testified that one employee was kneeling within three feet of the edge of the roof (Tr. 9). No warning lines had been installed, no monitor had been designated, no safety harnesses were available for the employee's use (Tr. 11-12).

According to Smith an employer may lose track of his position while working and slip or back over an unguarded edge (Tr. 16). Smith testified that the gravity of the violation is high, as a 30' fall could result in fractures and/or death (Tr. 13, 18). Smith stated he computed a gravity based penalty of \$5,000.00 (Tr. 13). Because Economy is a small company, and because Smith was unaware that Economy had received prior OSHA citations concerning fall protection violations, he proposed a reduced penalty of \$1,500.00 (Tr. 14). At the hearing, Complainant produced evidence that Economy had, in fact, been cited in July 1998 and again in October 1999 for violations of OSHA fall protection regulations. Both cases were settled informally and substantially reduced penalties were assessed (Tr. 19-20; Exh. C-4, C-5).

